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**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

No. 16-3748

CHARLES RAYMOND DIX, APPELLANT,

v.

DAVID J. SHULKIN, M.D.,  
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before ALLEN, *Judge*.

**MEMORANDUM DECISION**

*Note: Pursuant to U.S. Vet. App. R. 30(a),  
this action may not be cited as precedent.*

ALLEN, *Judge*: Appellant Charles Raymond Dix appeals through counsel a July 21, 2016, Board of Veterans' Appeals (Board) decision that denied him entitlement to (1) an effective date earlier than December 12, 2008, for his service-connected headache disability secondary to a neck injury; and (2) an effective date earlier than October 13, 2009, for his service-connected left trapezius muscle strain secondary to a neck injury. The Board additionally held that appellant withdrew his claim for an effective date earlier than December 12, 2008, for degenerative arthritis and, therefore, declined to discuss that claim substantively.<sup>1</sup> This appeal is timely and the Court has jurisdiction pursuant to 38 U.S.C. §§ 7252(a) and 7266(a).

The facts and procedural history underlying this appeal are complex and sometimes confusing. Indeed, it appears the errors that the Court finds in these proceedings are directly related to these complexities. However, despite that factual complexity, the legal issues are ultimately

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<sup>1</sup> The Board remanded claims for service connection for somatization disorder, claimed as chest pain, including due to herbicide exposure and entitlement to a total disability rating based on individual unemployability. These claims are not before the Court. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004). Appellant fails to make any argument concerning the Board's denial of an effective date earlier than September 21, 2011, for a grant of service connection for post-traumatic stress disorder (PTSD). In addition, he does not contest the Board's determination that he withdrew his claims for increased ratings for PTSD, radiculopathy of the cervical spine, and degenerative arthritis. The Court considers these matters abandoned. *See Pederson v. McDonald*, 27 Vet.App. 276, 283 (2015) (en banc).

relatively straight-forward. As such, single judge disposition is appropriate in this case. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). As explained below, the Court will set aside the decision on appeal and remand this matter for further proceedings consistent with this decision.

## **I. RELEVANT FACTS AND PROCEDURAL HISTORY**

Appellant served honorably in the United States Army from November 1, 1966, to October 30, 1970. R. at 4464. On September 27, 2001, he filed a claim for compensation identifying his disability as a "neck injury" that occurred during an in-service motor vehicle accident (MVA) in January 1968. R. at 4710–13. Attached to his claim were several continuation pages, a handful of which comprehensively described the origin, medical history, and symptoms of the neck injury present at that time. R. at 4714–17. In the section titled "[p]resent symptoms" he stated that the neck "injury continues to give me problems . . . [my] neck, head and left shoulder ache . . . [it] takes hours to go to sleep because of the ache in my neck and left shoulder/arm." R. at 4717. He added, "[a]s I write this document, my neck, head, and left shoulder ache, and the fingers on my left hand have begun to tingle." *Id.* On March 22, 2002, VA denied his claim for service connection, finding no nexus between the neck pain from an MVA and his current claimed neck condition. R. at 2413. VA highlighted that the "[s]eparation examination was silent for any complaints regarding his neck injury," yet, when VA issued that rating decision appellant's separation examination was not of record.<sup>2</sup> The decision did not mention the headaches or shoulder issues, at least as independent claims. Appellant did not appeal this decision and it became final.

On December 12, 2008, appellant notified VA that he wanted to reopen his previously denied neck disability claim and explicitly opened a claim for a headache condition secondary to his neck injury. R. at 4222–23. VA notified him that the appeal period had expired for the neck claim and that he must submit new and material evidence before that claim could be re-opened. On January 4, 2009, appellant supplied newly acquired service treatment records, including his

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<sup>2</sup> The Court is concerned by a clear misstatement in the regional office's (RO) 2002 denial of appellant's initial neck injury claim. The RO denied the presence of a causal nexus because appellant's separation examination was "silent" regarding a cervical spine condition. This is plainly false. The separation report (which *does* document a chronic cervical condition) was not of record during that decision and VA's statement suggests that it reviewed the record and considered its contents to be negative evidence. Not only is factual accuracy a requirement of the non-adversarial veterans benefits system, it is integral to an efficient judicial process. Furthermore, the RO's failure to recognize that an important service record was not present in the claims file suggests a failure of its duty to assist appellant in obtaining evidence necessary to substantiate his claim. *See* 38 U.S.C. § 5103A.

previously missing separation examination report, and VA re-opened his neck claim. R. at 4099. It also proceeded to adjudicate the headache claim. *Id.*

On October 13, 2009, VA received appellant's statement in support of claim, in which he outlined the new service records that he submitted and specifically mentioned pain in his neck, shoulders, and arms, and complained of headaches. R. at 3872. In his attached supplemental sworn statement, he explicitly referred to his left shoulder disability and expressed his belief that it was caused by his neck condition. R. at 3882 ("I continue to suffer from shoulder and arm pain, headaches, and other above listed problems, all of which appear to coincide with [my] neck pain and stiffness."). On October 19, 2009, appellant submitted a legal memorandum in support of his claims arguing that, in addition to granting service connection for the neck injury and related secondary conditions, the newly obtained service medical records support granting each an effective date of September 2001 pursuant to 38 C.F.R. § 3.156(c). R. at 3949.

In March 2010, a VA medical examiner reviewed appellant's new service medical records and opined that appellant's neck condition "is at least as likely as not due to, or related to or caused by [his] injury during service." R. at 3381. In a May 13, 2010, rating decision, VA granted appellant service connection for cervical stenosis and headaches secondary thereto, both effective December 12, 2008, based on the date appellant notified VA of his desire to reopen his denied neck claim and explicitly asked to open a headache claim. R. at 3504–3509.

In an August 3, 2010, rating decision, the Board granted appellant service connection for his shoulder disability as a "left trapezius muscle strain as secondary to the service-connected disability of cervical stenosis and disc disease," rated as 0% disabling effective October 13, 2009. R. at 5274. On September 21, 2011, appellant submitted a Notice of Disagreement (NOD) in which he sought higher ratings for his disabilities and "request[ed] earlier effective date[s] for [his] Neck Condition, Headaches secondary to Neck, Left Shoulder secondary to Neck, and Left Arm secondary to Neck back to original date of claim 9/27/2001." R. at 547–48.

On May 8, 2013, VA issued a rating decision in response to appellant's September 2011 NOD. In this decision, VA adjusted appellant's ratings to reflect changes to the diagnostic code (DC). Prior to this decision, appellant's neck disability was rated under 38 C.F.R. § 4.71a, DC 5242, titled "cervical stenosis," at 20% disabling, but this decision split appellant's claim into two separate ratings. He remained service connected under DC 5242, now titled "degenerative arthritis," at 10% disabling, and received a new rating under 38 C.F.R. § 4.124a, DC 8510, titled

"radiculopathy cervical spine associated with degenerative arthritis," at 20% disabling. R. at 2756–2761. Thus, for a single neck injury claim stream, appellant was service connected for cervical stenosis from December 12, 2008, through September 21, 2011, and for degenerative arthritis and radiculopathy from September 21, 2011, onward. Notably, this VA rating decision did not address appellant's arguments regarding earlier effective dates for any of his disabilities.

On August 1, 2013, VA supplied a Statement of the Case addressing appellant's arguments for earlier effective dates for his service-connected disabilities. Regarding appellant's neck injury, VA stated, "December 12, 2008 . . . is the date we received your claim. Entitlement to an earlier effective date since September 27, 2001[,] for degenerative arthritis (previously cervical stenosis and disc disease) is denied." Regarding his headaches, VA stated, "we granted you service connection for your headaches as secondary to your cervical condition effective December 12, 2008 . . . [t]herefore, entitlement to an earlier effective date . . . is denied." Lastly, regarding his left trapezius strain, the Board stated, "[w]e granted you service connection for left trapezius muscle strain effective October 13, 2009. This is the date we received your claim. Therefore, entitlement to an earlier effective date . . . is denied." VA did not address appellant's argument that his effective dates should relate back to 2001 based on his providing new service records and § 3.156(c). R. at 2723-25.

On September 18, 2013, appellant perfected his appeal to the Board. On May 21, 2014, he submitted a memorandum in support of his appeal. Therein he requested that VA "[g]rant a September 27, 2001, date of claim on the disability arising from my service connected neck injury." In this document, he again referred to a neck injury, headaches, and shoulder pain as being subject to the appeal. He also explicitly and thoroughly explained the theory that his neck claim and secondary conditions should relate back to September 2001 per § 3.156(c). R. at 2401–10. On February 16, 2016, appellant informed the Board he was withdrawing the portion of his appeal pertaining to the assigned effective date and rating percentage for "Radiculopathy Cervical Spine" and "Degenerative Arthritis." R. at 70. He specifically noted that he wanted to withdraw the portions of the appeal addressed in the June 9, 2015 Supplemental Statement of the Case. *Id.* On July 21, 2016, the Board issued its decision now on appeal. It held that appellant was not entitled to an effective date earlier than December 12, 2008, and October 13, 2009, for his headaches and left trapezius strain, respectively. R. at 7–10. The Board's decision did not discuss his request for

an earlier effective date for his neck disability nor did it cite or discuss § 3.156(c). This appeal followed.

## II. ANALYSIS

Appellant argues that the Board provided an inadequate statement of reasons and bases because it failed to discuss 38 C.F.R. § 3.156(c) and its relationship to the proper effective date for his service-connected cervical stenosis (i.e., the neck injury) and secondary conditions (i.e., the headaches and left shoulder disability). He also challenges the Board's factual determination that "there is no testimonial [*sic*] document submitted prior to the selected effective dates, indicating intent to pursue claims of entitlement to service connection for headaches [and] a trapezius muscle strain." R. at 8. Appellant asserts that the proper effective date for cervical stenosis should be September 21, 2001, per § 3.156(c), because that was the date he filed his initial, denied neck claim. Consequently, he asserts that his secondarily service-connected headache and shoulder disabilities should also relate back to 2001 because his symptomatology concerning head, neck, shoulder, and arm pain in his "neck injury" claim constituted informal claims for benefits for those conditions.

In response, the Secretary argues that the Board provided an adequate statement of reasons and bases for denying an earlier effective date for the grant of service connection for headaches and a left shoulder disability. He contends that the evidence and the law support the Board's finding that there was no communication constituting an informal claim from appellant or his representative prior to December 12, 2008, and October 13, 2009 (for the headache disability and left shoulder disability, respectively). Secretary's Br. at 11. He further argues that § 3.156(c) is inapplicable because appellant submitted his newly discovered service records before VA issued a final decision on his headache and shoulder claims. Secretary's Br. at 16–17. Lastly, the Secretary argues that appellant withdrew his appeal of the effective date for radiculopathy and degenerative arthritis and that he, therefore, cannot argue for an earlier effective date for those claims. Secretary's Br. at 9, 16.

The issues on appeal are complicated by the procedural history of appellant's claims. His neck injury, which has been continuously service connected since 2008, has been rated under three different diagnostic codes. Consequently, his secondary conditions have been "attached" to different primary conditions depending on the title of the DC at that time. Thus, to understand the

precise issues raised on appeal, specifically considering the Secretary's withdrawal arguments, the Court will first discuss the Board's conclusion that appellant has withdrawn his degenerative arthritis and radiculopathy appeals, and will then turn to appellant's (1) neck injury disability, followed by his (2) headache disability and left shoulder disability secondary to his neck injury.

#### 1. Withdrawal of Degenerative Arthritis and Radiculopathy Claims

The Court turns first to the Board's finding that appellant withdrew his appeals regarding the issues of entitlement to earlier effective dates and higher ratings for his service-connected degenerative arthritis and radiculopathy of the cervical spine. R. at 6–7. The Secretary argues that appellant is barred from seeking an effective date earlier than September 21, 2011, for his neck radiculopathy and degenerative arthritis since he "presents absolutely no arguments to counter the Board's finding that he withdrew these two claims." Secretary's Br. at 10. And this is where the confusion begins, confusion that the Board does not acknowledge and, therefore, does not resolve. Appellant has consistently pursued a claim concerning a neck injury. As described above, VA has characterized that neck disability claim in multiple ways. To add to the confusion, appellant has raised more than one challenge related to this claim, of particular relevance here, he seeks an earlier effective date and the appropriate rating.

The Secretary suggests that appellant, by withdrawing his appeals concerning degenerative arthritis and radiculopathy, has also withdrawn any and all claims related to his original "neck disability," including his secondary claims for headaches and a shoulder condition and an earlier effective date for the neck claim itself. Secretary's Br. at 16. The Board did not make its understanding of the scope of appellant's withdrawal clear in its decision and it, notably, did not address his argument for an earlier effective date for his broad "neck injury" claim (granted as cervical stenosis). Yet, appellant's VA Form 9 memorandum of law reflects his intention to appeal the assigned effective date for his broad "neck injury." R. at 2401 (requesting that VA "[g]rant a September 27, 2001, date of claim on the disability arising from my service connected neck injury.")

Further, the Board refers to (1) cervical stenosis and (2) degenerative arthritis interchangeably, only adding to the confusion. Of particular relevance was a statement regarding appellant's secondarily service-connected disabilities:

the Board notes that [appellant] was awarded service connection for [left shoulder strain] specifically as secondary to his cervical stenosis and disc disease (now rated

as degenerative arthritis) . . . [and] [a]lthough [he] initiated an appeal with respect to the effective date assigned for his degenerative arthritis, he withdrew his claim.

R. at 10. This, too, suggests that the Board believed appellant withdrew his cervical stenosis, or "neck injury" claim, by withdrawing his degenerative arthritis claim.

As the Secretary acknowledges, withdrawal of an appeal is only effective where such withdrawal is explicit, unambiguous, and done with a claimant's full understanding of the consequences of his or her actions. Secretary's Br. at 8 (citing *DeLisio v. Shinseki*, 25 Vet.App. 45, 57 (2011)). The Board must provide a statement of its reasons and bases to, in part, facilitate judicial review. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). It certainly has not done so here. First, it is not at all clear to the Court that the Board understood the various claim streams and how appellant's neck claim in particular fit into them. In addition, insofar as the Board considered appellant to have withdrawn *all* claims arising from his neck injury in 2001, it is not clear on what the Board based this conclusion. It must, at the very least, offer reasons and bases justifying its decision that appellant "fully understood" the consequences of that withdrawal, i.e., that he was also withdrawing his appeal of the effective date for cervical stenosis. Because the Court cannot determine the scope of the Board's withdrawal ruling, its reasons and bases are inadequate and this matter must be remanded for further consideration.

## 2. The Neck Disability Claim

As the Court just explained, remand is required for the Board to assess, and more fully explain its conclusions concerning, the withdrawal of a portion of appellant's neck-related claims. In this section, the Court explains why that error was significant and also provides additional guidance to the Board for proceedings on remand. Appellant asserts that the Board lacked adequate reasons and basis for its failure to apply 38 C.F.R. § 3.156(c) when it affirmed VA's assigned December 12, 2008, effective date for his service-connected cervical stenosis. This argument has substantial force, assuming that some portion of the neck claim remains on appeal. Subsection (c)(1) of the regulation demands that, "at any time after VA issues a decision on a claim, if VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim." 38 C.F.R. § 3.156(c)(1). Should the new records lead to the award of service connection for a disability, the effective date for entitlement shall be the date entitlement arose or the date VA first received the denied claim, whichever is later. 38 C.F.R. § 3.156(c)(3). The purpose of subsection (c) is "to place a veteran in the position he [or she] would have been had . . . VA

considered the relevant service department record before the disposition of [the] earlier claim." *Blubaugh v. McDonald*, 773 F.3d 1310, 1313 (Fed. Cir. 2014); New and Material Evidence, 70 Fed.Reg. 35,388, 35,389 (June 20, 2005) (proposed rule) (stating that revised § 3.156(c) will "allow VA to reconsider decisions and retroactively evaluate disability in a fair manner, on the basis that a claimant should not be harmed by an administrative deficiency of the government"); *see also Pacheco v. Gibson*, 27 Vet.App. 21, 32–33 (2014) (en banc) (Pietsch, J., concurring) (noting that subsection (c) "is an exception to finality").

As with all questions of law, this Court reviews the Board's application of this regulation under a de novo standard. *Miller v. West*, 11 Vet.App. 345, 347 (1998); *Crowe v. Brown*, 7 Vet.App. 238, 245 (1994). However, to enable such a review, the Board must provide a written statement of the reasons and bases behind its conclusion. 38 U.S.C. § 7104(d)(1); *Allday*, 7 Vet.App. at 527. To the extent that a neck claim remains on appeal (a subject that the Court explained the Board must fully address on remand), the Court holds that the Board failed to provide adequate reasons and bases for its failure to apply § 3.156(c) and, therefore, has frustrated judicial review.

In this case, VA denied appellant's original 2001 claim for service connection because it found no nexus between his neck pain from an MVA and his current claimed neck condition. R. at 2413. The record suggests that, after appellant submitted his newly obtained service examination report in 2008, the RO reopened his claim specifically because of the newly acquired service records. This is exactly the scenario in which § 3.156(c) applies. *See George v. Shulkin*, \_\_ Vet.App. \_\_, 2018 U.S. App. Vet. Claims LEXIS 130 at \*10–\*14 (Feb. 5, 2018). However, the Board not only failed to discuss § 3.156(c), its decision is devoid of any discussion about the proper effective date for appellant's cervical stenosis.

The Secretary argues that the Board was not required to discuss § 3.156(c) because it need not discuss a regulation that is not applicable. Secretary's Br. at 17 (citing *Brown v. Nicholson*, 21 Vet.App. 290, 295 (2007)). The Court agrees with this tautological statement in the abstract, but we operate in the concrete world on this appeal. The Secretary contends that the regulation only applies if service records are received after VA issues a final decision and that appellant sent his service records prior to final Board decisions on his secondary headache and shoulder claims. This response is relevant only if one assumes—as the Secretary does but the Board did not satisfactorily explain—that the neck-related claims have been fully abandoned. In other words, the Secretary's



response only addresses the application of § 3.156(c) to the effective dates associated with appellant's headache and shoulder disability claims explicitly raised in 2008 and 2009.

Appellant asserts that § 3.156(c) entitles him to a September 2001 effective date for his underlying cervical stenosis claim, not his secondary headache and shoulder claims related to it. Appellant's Br. at 19. He seeks a September 2001 effective date for his secondary claims based on a different theory: that he made informal secondary claims for his shoulder and headache conditions when he discussed those symptoms as part of his original claim from 2001 (a matter the Court turns to in a moment). In that regard, appellant asserts that a readjudication of his neck claim under § 3.156(c)(1) would include a review of any potential informal claims as well. He does not contend, as the Secretary seems to argue, that § 3.156(c) applies to his explicit claims for secondary service connection that he filed in 2008 and 2009 after the submission of his separation examination report.

Whether the RO reopened appellant's claim based on the new service medical records is a factual determination for the Board, but § 3.156(c) is, at the very least, *potentially applicable* based on the facts of record, again assuming some portion of the neck claim remains on appeal. *See Schafrath v. Derwinski*, 1 Vet.App. 589, 593 (1991) (the Board must consider and discuss all "potentially applicable" provisions of law and regulation). Thus, the Court finds that the Board did not discuss appellant's claim for an earlier effective date for cervical stenosis or the application of § 3.156(c) and has, therefore, frustrated the Court's judicial review to the extent that a portion of the neck claim remains on appeal. *See* 38 U.S.C. § 7104(d)(1); *Allday*, 7 Vet.App. at 527. This error warrants remand for a discussion of appellant's cervical stenosis claim on appeal and if so, to consider the applicability of the regulation. *See Young v. Shinseki*, 22 Vet.App. 461, 466 (2009).

### 3. The Headache and Shoulder Disability Claim

That leaves us with the issue of appellant's claims for headaches and a left shoulder disability, specifically whether he is entitled to an effective date earlier than 2008 and 2009, respectively. Appellant's basic argument is that he is entitled to an effective date of September 21, 2001, for both conditions. He contends that when he filed his broad "neck injury" claim in 2001, he also filed informal headaches and shoulder condition claims.

Under regulations in place at the relevant time, claims for benefits could either be made formally or informally. *See* 38 C.F.R. 3.1(p) (2001). As the Court explained, "the essential requirements of any claim, whether formal or informal," are "(1) an intent to apply for benefits,

(2) an identification of the benefits sought, and (3) a communication in writing." *Brokowski v. Shinseki*, 23 Vet.App. 79, 84 (2009). Whether a submission constitutes an informal claim has been the subject of differing standards of review at the Court. On one version of the review question, a conclusion that an informal claim has not been made will only be set aside if it is arbitrary or capricious. *See, e.g., King v. Shinseki*, 23 Vet.App. 464, 468 (2010). Another strand of authority provides that a determination whether an informal claim has been made is a question of fact, which the Court reviews under the "clearly erroneous" standard. 38 U.S.C. § 7261(a)(4); *Brokowski*, 23 Vet.App. at 85. "A factual finding 'is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). The Court need not resolve the question of the appropriate standard of review, however, because the application of either standard leads to the same conclusion.

This Court has long held that when a claimant files a claim for compensation, it is not "to receive benefits only for a particular diagnosis, but for the affliction his . . . condition, whatever that is, caused him." *Clemons v. Shinseki*, 23 Vet.App. 1, 5 (2009) (per curium). When making a claim, "a claimant is not expected to have medical expertise and generally 'is only competent to identify and explain the symptoms that he observes and experiences.'" *DeLisio v. Shinseki*, 25 Vet.App. 25, 53 (2011) (quoting *Clemons*, 23 Vet.App. at 5). Furthermore, the Board is required to consider all claims reasonably raised by the evidence of record, including the claimant's lay testimony. *Robinson v. Peake*, 21 Vet.App. 545, 552 (2008) (*aff'd sub nom., Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009)). This includes consideration of contradictory or alternative claims that differ from the originally claimed condition. Indeed, this Court has held that "multiple medical diagnoses or diagnoses that differ from the claimed condition do not necessarily represent wholly separate claims." *Clemons*, 23 Vet.App. at 4.

The Court finds that the Board's discussion of appellant's statements made within his neck claim in 2001 is inadequate to decide whether it correctly analyzed them in light of *Clemons* and *DeLisio* to determine whether informal claims for headaches and a left shoulder condition had been made. The Board appears to have relied solely on the title of appellant's claim. R. at 8–9. That is not consistent with the law. The Board did not consider, in a way that facilitates this Court's

review, whether appellant's statements in 2001 reported only symptoms of his neck condition or, instead, were independent, even if informal, claims.<sup>3</sup>

In sum, whether appellant's statements discussed above, among others in the record, satisfy the standard set forth in *Clemons* and *DeLisio* is a determination that the Board must make in the first instance; however, since the Board did not discuss them, its reasons and bases are inadequate to facilitate judicial review and remand is appropriate. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (stating that remand is appropriate "where the Board has . . . failed to provide an adequate statement of reasons or bases for its determinations"). The Secretary provides a post hoc rationalization in his brief for the Board's errors, by both attempting to distinguish *Clemons* and *DeLisio* and by analyzing appellant's statements himself, but once again, this reasoning is absent from the Board's decision. *See Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156 (1991) ("'[L]itigating positions' are not entitled to deference when they are merely appellate counsel's 'post hoc rationalizations' for agency action advanced for the first time in the reviewing court.").

The Secretary argues that, because appellant has an effective date of December 12, 2008, for cervical stenosis, "it would be illogical and contrary to law to grant appellant an effective date for his secondary conditions that is earlier than the effective date for his primary conditions." Secretary's Br. at 16 (citing *Ellington v. Peake*, 541 F.3d 1364, 1369 (Fed. Cir. 2008)). First, any possible *Ellington* issue is not ripe for consideration, as it would first require the Board to address appellant's claim for an earlier effective date for cervical stenosis, which it neglected in its July 2016 decision. But more importantly, appellant is seeking the same 2001 effective date for all three conditions, rendering *Ellington* inapplicable here. Should the Board, upon remand, find that appellant's statements concerning headaches and shoulder pain from 2001 were informal claims and also find that his neck claim does *not* relate back to 2001 under § 3.156(c), then *Ellington* may require discussing. But first, VA must undertake a full readjudication on the merit of appellant's 2001 claim, including a sympathetic reading of his statements to decide whether his primary claim should have an earlier effective date, but also to decide whether the secondary conditions related to it should follow suit. *See Robinson*, 21 Vet.App. at 552.

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<sup>3</sup> The Board's reasoning is also factually incorrect because the Board stated that, even if appellant's complaint of left shoulder pain was an informal claim, he withdrew his degenerative disc claim and, therefore, he cannot seek an earlier effective date than September 12, 2008. This is error because appellant's left trapezius strain is secondary to his cervical stenosis, which, as discussed above, the Board did not make clear was withdrawn.

### III. CONCLUSION

After consideration of the parties' briefs and a review of the record, the Court SETS ASIDE the Board's July 21, 2016, decision and REMANDS this matter to the Board for further proceedings consistent with this decision. On remand, appellant may submit additional evidence and arguments in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order), and the Board must consider any such evidence or arguments submitted. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Board must proceed expeditiously, in accordance with 38 U.S.C. § 7112.

DATED: February 26, 2018

Copies to:

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